Supreme Court, U.S.
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No. 85-1706

IN THE

Supreme Court of the United States

October Term, 1985

NANNIE CLARK, *Petitioner,*

vs.

INDIANA DEPARTMENT OF PUBLIC WELFARE and THE DIRECTOR OF THE INDIANA DEPARTMENT OF PUBLIC WELFARE, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE INDIANA COURT OF APPEALS, FIRST DISTRICT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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THE FEDERAL QUESTION WAS PROPERLY PRESENTED TO THE INDIANA STATE COURTS

The respondents, Indiana Department of Public Welfare and its director, assert that petitioner, Nannie Clark, did not properly present the federal question in this case to the Indiana courts. The respondents ("welfare department") identify the question presented for review as: "Must a prospective litigant file a notice of tort claim prior to filing a 42 U.S.C. §1983 action in state court." Brief of Respondents in Opposition to Petition for Writ of Certiorari at i. This issue has been consistently presented and was actually decided by the Court of Appeals of Indiana. The Supreme Court of Indiana declined to review the case without comment.

The petitioner, Nannie Clark ("Clark"), prevailed at trial and was awarded damages in the amount of $1,000.[1] The welfare department itself presented the issue that is before this Court to the Court of Appeals of Indiana. "This court should adopt the position that in a §1983 claim brought in state court, the litigant must adhere to state law regarding the filing of tort actions." Brief of Appellants at 13. Clark similarly stated her view on this question to the Court of Appeals.

> The state is attempting to invoke the protection of its own immunity statute [the Indiana Tort Claims Act] against rights guaranteed by the U.S. Constitution. Because the very purpose of §1983 is to provide a remedy for state infringement of federal rights, it would be contrary to that purpose to require a state court to accept jurisdiction of a §1983 claim, and then permit it to apply its own immunity statute to bar the claims. *Martinez* [*v. California*, 444 U.S. 277 (1980)] protects the right to enforce constitutional claims in state court, free from a state's attempt to immunize itself.

Brief of Appellee at 23.

The Court of Appeals of Indiana specifically addressed and resolved this question, rejecting Clark's position.

> Clark argues that the ITCA [Indiana Tort Claims Act] notice provision is inapplicable to §1983 actions because it is contrary to federal policy. . . . Because it is a procedural precondition to sue, it overrides the procedural framework of §1983 when the litigant chooses a state court forum.

478 N.E.2d at 702. Clark's Petition for Rehearing to the Court of Appeals again clearly framed the federal question. "Specifically, Clark is asking the Court to reverse its hold-

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[1] The fact that Clark has a damage award of $1,000 at stake is itself sufficient to create an actual controversy between the parties and avoid any danger of this Court issuing an advisory opinion.

ing that her §1983 claim against the Indiana Department of Public Welfare is barred by the operation of the Indiana Tort Claims Act (ITCA)." Petition for Rehearing at 1. The welfare department agrees that the federal question was presented by Clark to the Supreme Court of Indiana.

The federal question here involves the extent to which states may burden the litigation of §1983 actions in state court, specifically through a notice of claims procedure. It is not material to the presentation of this question that the Court of Appeals of Indiana viewed the notice of claim provision as a procedural precondition to sue; whereas Clark contends that it is an impermissible burden in the nature of an exhaustion of administrative remedies requirement. The fundamental question of the limits on state imposed burdens upon §1983 litigation in state court has been precisely and consistently drawn by the parties and decided by the Indiana Court of Appeals.

This Court has required that the federal questions presented for review be properly raised in state court, but it has not required that the questions be raised in precise terms. The presentation of the federal question in this case was substantially more clear and consistent than in *Braniff Airways v. Nebraska State Board of Equalization and Assessment*, 347 U.S. 590 (1954). The issue there was whether an aircraft had attained a taxable situs within Nebraska. The Court observed that the appellant's presentation of the issue as raising a question under the Commerce Clause was erroneous and that the question presented was properly one of due process. The Court stated: "[A]ppellant timely raised and preserved its contention that its property was not taxable because such property had attained no taxable situs in Nebraska. Though inexplicit, we consider the due process issue within the clear intendment of such contention and hold such issue sufficiently presented." *Id.* at 599. As in *Braniff Airways*, Clark has throughout identified as the federal question in this case whether §1983 actions in state court can be

burdened with the notice of claims provisions of the Indiana Tort Claims Act.

This case is not like *Stembridge v. Georgia*, 343 U.S. 541 (1952) or *Congress of Industrial Organizations v. McAdory*, 325 U.S. 472 (1945). In both of those cases, the federal question was not presented at all in a timely fashion to the state appellate courts. In *Stembridge*, the federal question was never mentioned until a petition for rehearing in the Court of Appeals of Georgia. Thus, when the Supreme Court of Georgia denied certiorari, it was clearly supportable by the adequate and independent state ground that the federal question had not been earlier presented. In *McAdory*, the question was never raised in or decided by the only state appellate court to consider the case, the Supreme Court of Alabama.

Neither is the welfare department's reliance upon *City of Indianapolis v. Wynn*, 239 Ind. 567, 159 N.E.2d 572 (1979) applicable. There the Supreme Court of Indiana properly rejected as untimely a new issue regarding the joinder of necessary parties to the appeal, raised for the first time on a petition for rehearing after the Supreme Court of Indiana had already disposed of the merits of the appeal.

None of these cases have application when, as here, the petitioner has urged her position on the federal question at every opportunity and when the only state appellate court to consider the question addressed it directly.

Respectfully submitted,

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